In the Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-1054

OHIO STATE BOARD OF EDUCATION

— and —

MARTIN W. ESSEX, Superintendent of Public Instruction; JAMES A. RHODES, Governor of the State of Ohio; and WILLIAM J. BROWN, Attorney General of the State of Ohio,

Petitioners

— vs —

MONA BRONSON, by her parent and next friend, Charles Bronson; TONY FLETCHER, by parent and next friend, Mrs. Parilee Fletcher; GLENN ALEXANDER, by parent and next friend, Mrs. Harvena Alexander; NINA SHAPIRO, by parents and next friend, Mr. & Mrs. Judith and Herbert Shapiro; CHAUSTON BROWN, by parent and next friend, Mrs. Lueckiucius Brown; MARK GERARD SILLETT, by parent and next friend, Mrs. Anastasia Sillett; PARRISH LATTIMORE, by parents and next friend, Mr. & Mrs. Donald Lattimore, Jr.; ROBIN FRYE, by parent and next friend, Betty J. Frye; VALERIE MILLER, by parents and next friend, Mr. & Mrs. Charles Miller; ANDRE HARRIS, by parent and next friend, Mrs. Janet Harris; DAVID FRIEL, by parents and next friends, Mr. & Mrs. Kent Friel; MICHAEL SEXTON, by parent and next friend, Stephen R. Sexton; And on behalf of all persons similarly situated; ROBERT S. BROWN and RONALD J. TEMPLE, individually and as members of the Board of Education of the City School District of the City of Cincinnati,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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EDUCATION and
MARTIN W. ESSEX

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Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered September 24, 1975, which affirmed as modified and interpreted an opinion and order of the United States District Court for the Southern District of Ohio, Western Division, entered January 30, 1975.

RELATED PETITION FOR CERTIORARI

On January 20, 1976, the Cincinnati Board of Education and its Superintendent filed their Petition for Certiorari No. 75-1023. Those petitioners, and the petitioners in this Petition, were joint defendants and joint appellees

below. This Petition for Certiorari raises essentially the same question presented in the related Petition for Certiorari, with an effort to avoid undue repetition, and also raises a sub-question which is unique to the instant petitioners, and which is of general interest to state officials. It is respectfully suggested that the two Petitions be considered as related.

OPINIONS BELOW

The opinion of the court of appeals is not yet reported. The opinion of the court of appeals which granted permission to appeal from an interlocutory order is reported at 512 F. 2d 718 (6th Cir. 1975). A petition for rehearing was denied on October 30, 1975. The opinion of the district court is unreported. All opinions are reproduced in the Appendix of the related Petition for Certiorari, referred to above, and will not be reproduced herein.

JURISDICTION

The opinion of the court of appeals was entered September 24, 1975. A Petition for Rehearing was timely filed, and was denied on October 30, 1975. A copy of the Order overruling the Petition, with the dissenting opinion, is reproduced in the Appendix of the related Petition for Certiorari. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

Does a judgment in favor of the board of education in a school desegregation case have the same binding effect which judgments in other types of cases are given?

STATEMENT OF THE CASE

This class action for an injunction was instituted on May 29, 1974, jurisdiction of the district court having been invoked under 28 U.S.C. Sections 1331(a) and 1343(3) and (4). Plaintiffs are students of the Cincinnati public schools and their parents, suing "on behalf of all persons in the State of Ohio similarly situated." The complaint alleges that the Cincinnati public schools are racially segregated in violation of the Fourteenth Amendment to the Constitution of the United States, as a result of various actions and inactions of the defendants. The defendants in the district court were the Cincinnati Board of Education and its Superintendent, referred to as "local" defendants (the related petitioners), the State Board of Education and the State Superintendent of Public Instruction, as well as the Governor and the Attorney General of Ohio. These latter four "State" defendants are the petitioners herein.

This case in its present posture is concerned with but a single question: Whether all defendants may properly assert the defense of collateral estoppel. All defendants raised such defense, and the defense was sustained by the district court as to all defendants. The court of appeals granted permission to appeal from this interlocutory order of the district court, 512 F. 2d 718 (6th Cir. 1975). After full briefing, the court of appeals affirmed the order of the district court, "as modified and interpreted". As will be argued, the actual effect of this order was to reverse the holding of the district court. It is this "modification" that petitioners would have this Court review.

The defense of collateral estoppel in this case is based upon *Deal v. Cincinnati Board of Education*, 244 F. Supp. 572 (S. D. Ohio 1965), *aff'd* 369 F.2d 55 (6th Cir. 1966), *cert. denied* 389 U.S. 847 (1967), *aff'd on other issues* 419 F. 2d 1387 (6th Cir. 1969), *cert. denied* 402 U.S. 962

(1971), an action to which the State defendants here were not parties. *Deal*, also a class action, had asserted the same claims of racial segregation that are being asserted here, and those claims were found to be without merit.

The State defendants in this case have claimed that they may benefit from the prior adjudication in *Deal* to the same extent as the local defendants, even though the State defendants were not parties to *Deal*. Both courts below sustained this claim, which was not challenged by plaintiffs-respondents. Rather, plaintiffs merely opposed the collateral estoppel defense as to all defendants generally.

At to the question of "plaintiff identity" in *Deal* and in this case, the court of appeals stated:

> "For the purposes of collateral estoppel we do not consider the plaintiffs in the present action to be 'strangers' to the *Deal* litigation." (Related App. 10a)

In this case, the decision of the court of appeals can only be likened to a Byronic Julia, who, all the while protesting affirmance, nevertheless "modified and interpreted" the district court's order in such a way as to reverse it in effect.

The operative portions of the opinion of the court of appeals are as follows:

A. "To the extent that the pre-1965 actions and policies of the Board and the conditions which existed on July 26, 1965, are relevant to a determination of the existence or non-existence of unlawful segregation at the times involved in this case, the district court may take judicial notice of facts stipulated or proven in *Deal*." (Related App. 11a)

B. "If new evidence of pre-*Deal* occurrences or conditions is offered, the district court will determine in each instance whether or not such evidence is rele-

vant to . . . [claims arising] . . . during the post-July 25, 1965, period involved in this action . . . ." (Related App. 12a)

C. "Nevertheless, there are children attending the Cincinnati schools now who either were not born in 1965 or had not started to school." * * * "The complaint of such children and their parents of alleged continuing wrongful acts subsequent to 1965 declares a different cause of action than that concluded by *Deal*, one to which estoppel does not apply." (Related App. 10a)

Such a shocking departure from established rules for the application of collateral estoppel does not proceed from any unusual findings. The court further stated quite properly:

D. "We conclude that there has been no such change in the law since *Deal* as to prevent altogether the application of the doctrine of collateral estoppel to this case." (Related App. 9a)

E. ". . . [W]e do not believe that school desegregation cases are so different from other types of litigation that principles of res judicata and collateral estoppel should never be applied to them." (Related App. 9a)

F. "The district court's order forecloses the plaintiffs from showing that the defendants did, prior to July 25, 1965, act with a segregative intent, or that the actions, inactions, or policies of the Board prior to that date violated the constitutional rights of minority pupils or their parents. These issues have been decided and under the issue preclusion application of collateral estoppel may not be reopened." (Related App. 10a)

Rather, such a shocking departure from established rules is based partly upon an erroneous view of the law of collateral estoppel, and partly upon a misunderstanding of the binding effect of a judgment in a class action.

The concurring opinion brings the decision to its inevitable conclusion – the *Deal* findings are entitled to no finality:

A. ". . . [S]o long as the *Deal* findings are not directly or indirectly contradicted, the court in the case at hand is free to rely upon the evidentiary fruits of the earlier case in determining whether the present status of the Cincinnati school system is the result of constitutional violations on the part of the defendants." (Related App. 13a)

B. "To the extent that newly discovered evidence of pre-1965 occurrences is relevant in assessing the constitutionality of defendants' conduct after July 26, 1965, it may be admitted for that purpose." (Related App. 14a)

C. "School children born or starting to school after the decision in *Deal II* are entitled to have introduced . . . relevant evidence as to matters occurring prior to July 25, 1965, regardless of whether the evidence contradicts the *Deal* findings." (Related App. 14a)

D. "If new evidence of pre-1965 events, substantially undercutting the *Deal* findings, is introduced on behalf of school children born or starting to school after the decision in *Deal II*, the district court may receive it and should consider whether some or all of those findings continue to be viable." (Related App. 14a)

The dissenting opinion, referring to the eleven years of litigation in *Deal*, the time, the expense, the burden on all three federal courts, twice in each of them, states:

> "If the plaintiffs are to prevail, all of this has been wasted effort and futile. The Board would have been bound if it had lost the case, but not the plaintiffs who claim to be exempt from the time-honored rules of res judicata and collateral estoppel." (Related App. 21a)

REASONS FOR GRANTING THE WRIT

A. Unique Position Of Petitioners

Petitioners have a totally unique interest in this case, which interest is shared directly by the chief officers of every state in the Sixth Judicial Circuit, and possibly by every chief officer of every state in the nation.

High public officers are required by this decision to abandon any reliance upon final judicial decrees, and vis-a-vis any responsibility such officers may have for the conduct of local officials, to make their independent evaluation of such conduct, even though such evaluation may be in conflict with final judgments of the courts as to that very same conduct.

Petitioners are the State Board of Education and the Superintendent of Public Instruction, together with the Governor and the Attorney General of Ohio. They are charged by plaintiffs with derivative responsibility for any constitutional derelictions of duty as may be found to exist in the conduct of the local school authorities.

These state officers had believed, on the basis of decisions of this Court in cases such as *Blonder-Tongue Labs. v. University of Illinois Foundation*, 402 U.S. 313 (1971), *Commissioner v. Sunnen*, 333 U.S. 591, 597-8 (1948), and other cases cited, *infra*, that after observing the progress of *Deal* for eleven years they were entitled to rely on the decisions of the federal courts in that case, even though they had not been parties to that litigation.

The decision below abruptly and shockingly tells these state officers that they had no such right of reliance, and that they must now appear in those very same courts, and devote their time, their energies, and their resources to defending their responsibility, if any, for that very same conduct of the local school authorities, which every court had adjudged blameless.

Unless this Court grants certiorari in this cause, no public official in any state can rely upon the decision of any court, but must make an independent evaluation of any judicial decree, to ascertain his proper course of conduct. New evidence would be admissible to controvert any previous judicial finding. We respectfully submit that this decision produces chaos in any orderly judicial system.

B. The Decision Below Contravenes The Decisions Of This Court On Collateral Estoppel

The doctrine of res judicata, and the related doctrine of collateral estoppel, have been carefully developed by this Court over many years.

Heiser v. Woodruff, 327 U.S. 726 (1946) placed the doctrine in focus. This Court in *Heiser*, at p. 733, succinctly stated:

> ". . . [W]e are aware of no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of *res judicata*, which is founded upon the generally recognized public policy that there must be some end to litigation and that when one appears in court to present his case, is fully heard, and the contested issue is decided against him, he may not later renew the litigation in another court."

Commisisoner v. Sunnen, *supra*, defined the related doctrine of collateral estoppel.

Supreme Tribe of Ben Hur v. Cauble, 255 U.S. 356 (1921) applied the doctrine to class actions. *Hansberry v. Lee*, 311 U.S. 32 (1940) imposed the requirement, where the doctrine is applied to class actions, that the litigants in the second action are bound only where the requirements of due process, such as adequate representation, had been observed in the previous action.

And finally, *Blonder-Tongue Labs. v. University of Illinois Foundation, supra,* allowed the defense of collateral estoppel to one not a party to the original action, provided that those same requirements of due process had been observed.

Ignoring these clear decisions of this Court, the court below relied merely upon Professor Moore, and his preoccupation with the pre-1966 procedural Rule 23, which preoccupation ignored the Rules Enabling Act (28 U.S.C. Section 2072). That Act clearly provides that the Rules of Civil Procedure ". . . shall not abridge, enlarge or modify any substantive right . . . ." Res judicata and collateral estoppel, however, have long been held to be matters of substantive law. *Blonder-Tongue Labs. v. University of Illinois Foundation, supra,* at 324, citing *Heiser v. Woodruff, supra,* at 733.

It is undisputed that the plaintiffs in *Deal* were adequately represented, as required by *Hansberry v. Lee, supra.* Nonetheless the court of appeals has done what this Court in *Heiser v. Woodruff, supra,* specifically disapproved, and has rejected the "salutary principle of *res judicata*" in this school desegregation case.

C. Review By This Court Will Expedite This Case

The same reasons which caused the district court to certify this issue on appeal, and which caused the court of appeals to grant immediate appeal under 28 U.S.C. Section 1292(b), support review by this Court at this time.

A school desegregation case is almost by definition a protracted case. This case, wherein the decision below permits evidence back to as early a date as plaintiffs elect, promises extreme length. It would be tragic to require the parties and the trial court to devote their resources to an extremely lengthy trial, only to find, on subsequent appeal,

that the rule laid down below on collateral estoppel is in error, and that the entire case should be re-tried on post-*Deal* evidence only.

This case cannot move forward expeditiously until the issues of collateral estoppel are laid to rest.

CONCLUSION

Because this case squarely presents such serious issues of common interest to all state officers in the nation, because the decision below is in such clear conflict with well-settled decisions of this Court, and because this case itself can move forward expeditiously only if these issues are presently determined, it is respectfully requested that the writ for which these petitioners pray be issued.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Petition for a Writ of Certiorari to The United States Court of Appeals for the Sixth Circuit were sent this ..... day of January, 1976, by regular U.S. mail, or air mail, in accordance with Rule 33 of the Rules of Practice of the Supreme Court of the United States, to the following:

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